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IN THE

Supreme Court of the United States

October Term, 1965

No. 1122

MAE MALLORY, HAROLD REEP, RICHARD CROWDER, JOHN C. LOWRY, and THE RESOLUTE INSURANCE COMPANY and TIDEWATER BONDING AND SURETY AGENCY, INC., Sureties for MAE MALLORY, HAROLD REEP and RICHARD CROWDER,

Petitioners,

against

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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Petitioners,

against

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

To the Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of North Carolina, entered on December 15, 1965, which modified and affirmed the order and judgment of the Union County Superior Court, which denied petitioners' motion to dismiss the judgment *nisi* entered against them, and ordered entry of judgment absolute on the appearance bonds posted by petitioners and which resulted in the forfeiture of said bonds to the State of North Carolina.

Opinion Below

The opinion of the Supreme Court of North Carolina is attached hereto as Appendix A. Apparently, it has not, as of the date of this petition, been reported.

Jurisdiction

The judgment of the Supreme Court of the State of North Carolina was entered on December 15, 1966. The jurisdiction of this Court is invoked under Title 28 U. S.C. § 1257(3).

Questions Presented

1. Whether a state court may constitutionally hold a person in custody where the indictment under which he has been held has been voided and no warrant, information or other legal charges against him are outstanding?

(a) May an appellate court *sua sponte* order the detention of a person for the action of the grand jury in the absence of a preliminary hearing?

(b) May an appellate court continue the existence of an appearance bond under circumstances when it could not require the detention of the person for whose appearance the bond was posted?

2. Whether a state may declare forfeit appearance bonds posted pursuant to an indictment void because of the systematic exclusion of Negroes from the rolls of the indicting grand jury when new indictments for the same offenses have been returned by another grand jury equally tainted?

(a) May a state declare forfeit appearance bonds posted pursuant to an indictment void because of the systematic exclusion of Negroes from the rolls of the indicting grand jury without according petitioners an evidentiary hearing as to the reformation of said rolls prior to a new indictment for the same offense?

3. Whether a state may, consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, require the appearance of

a criminal defendant to answer an indictment (a) without notice to him of the return of such indictment; (b) without notice to him of any necessary appearances in connection with said indictment; and (c) without giving him a reasonable opportunity to challenge the validity of said indictment before the forfeiture of his bond?

4. Whether the standard of forfeiture adopted by North Carolina insofar as petitioners were concerned was arbitrary and in violation of the Equal Protection Clause of the Fourteenth Amendment in that it resulted in depriving civil rights defendants of criminal bonds under circumstances when other defendants would not and have never been similarly deprived.

Statement of Facts

In August of 1961, petitioners John C. Lowry (white), Mae Mallory (Negro), Harold Reep (Negro) and Richard Crowder (Negro) (hereinafter referred to as petitioners) were participants in peaceful civil rights demonstrations protesting segregation, racial intolerance and terrorization by the Ku Klux Klan and others in Monroe, N. C. During these demonstrations, there were numerous instances of individual physical assaults on demonstrators as well as mass attacks upon them by members of the community. In addition, there were many threats of armed violence to the demonstrators as well as to the entire Negro community. During picketing by Negro and white demonstrators at the Union County Courthouse, for example, cars bearing such signs as "OPEN SEASON ON COONS" and "DEATH TO ALL NIGGERS AND NIGGER LOVERS" circled the area. On one instance, a city-owned truck sprayed abrasive disinfectant on the picketers.

On August 27, 1961, shortly after a vicious armed attack by thousands of enraged whites on the courthouse demonstrators, a white couple drove through the Negro

community. Because of their fear of another attack by armed white people, the Negro residents blocked the car's passage. The couple then sought refuge in the home of the then president of the local chapter of the National Association for the Advancement of Colored People, where they remained without harm for several hours before driving home. The State contended, however, that this couple had been kidnapped and, three days later, indictments * were handed down against the four petitioners for kidnapping by an exceptional grand jury specially convened to hear charges against all of the demonstrators.

Not until three years later, after numerous postponements by the State, were petitioners finally brought to trial in the Union County Superior Court. Each of the petitioners was thereupon convicted of two counts of kidnapping by a jury that took approximately a half-hour to deliberate on the eight counts of the indictments, and then sentenced to varying terms in the state penitentiary. Petitioners thereupon duly filed notices of appeal to the Supreme Court of North Carolina.

Pending their appeals, petitioners were required to post "appearance bonds".** Petitioners Mallory, Reep and Crowder posted said appearance bonds with petitioners Resolute Insurance Company and Tidewater Bonding and Surety Agency, Inc., (hereinafter referred to as the surety petitioners) as sureties thereon, and same were duly filed with the Union County Superior Court. The terms of these bonds were the same as to each of these petitioners except for the amount involved.

---

* It is significant to note that these indictments were apparently the first legal process issued against petitioners by the state courts.

** Significantly these bonds, as well as Lowry's cash bond, *infra*, were posted only in connection with the appeal inasmuch as no warrants then existed for petitioners' arrests.

The relevant terms of these bonds are as follows:

> "The condition of this bond is such that whereas the above bounden [Mallory, Reep, Crowder] having been convicted in the Superior Court, Union County, North Carolina, in the above numbered cases, and having appealed from the judgments and sentences of the court to the Supreme Court of North Carolina, and the court having fixed [their] appearance bond in these cases . . . in the amount of [petitioner Mallory—$15,000; petitioner Reep—$7,500; petitioner Crowder—$10,000] dollars;
>
> "Now, therefore, if the above bound defendant [Mallory, Reep, Crowder] shall make [their] appearance at the May 4, 1964 Term of Union County Superior Court and at each succeeding term of said court pending the final disposition of the above cases, and shall not depart the same without leave of the court, then this obligation shall be void; otherwise to remain in full force and effect."

Petitioner Lowry posted a cash bond of $5,000 provided by his wife, Marcia Lowry. The relevant terms of said appearance bond are as follows:

> "In this case the defendant, John Cyril Lowry, and Mrs. Marcia Lowry, his sureties, come into court and acknowledge themselves indebted to the State of North Carolina in the sum of Five Thousand ($5,000.00) Dollars.
>
> "The conditions of the above obligation are such that if the above bounden defendant John Cyril Lowry shall make his personal appearance at the next Term of this court to be held in May 4, 1964, and at each succeeding term of said court pending the final disposition of the above cases . . . and not depart the same without leave, then its obligation to be null and void, otherwise to remain in full force and effect."

The appeal of individual petitioners was duly perfected in the Supreme Court of the State of North Carolina, and

on January 29, 1965, the court reversed all convictions and quashed each indictment. 263 N. C. 536, 139 S. E. 2d 870. The indictments were quashed because the court found that Negroes had been intentionally excluded from the rolls of the grand jury which had rendered them. The opinion of the court is attached hereto as Appendix B.

As of the date of the reversal of petitioners' convictions, there were no longer any formal charges against them, inasmuch as no warrant had ever been issued for their arrest nor had any other legal process issued against them, except for the indictments, which were now quashed. Further, from January, 1965, until May, 1965, petitioners were never contacted by any local or state police or judicial officials, nor was any legal process ever issued against them during this period. At no time were they given notice that the State intended to seek their reindictment for the crime of kidnapping, or that the State intended to hold the appeal appearance bonds posted by them.

In the February, 1965, Term of the Union County Superior Court, Judge W. H. S. Burgwyn ordered the completion by the County Commisisoners of a new grand jury list without regard to race, creed or national origin. At the May, 1965 Mixed term of the Union County Superior Court, Judge Eugene G. Shaw found *ex parte,* that Judge Burgwyn's order had been complied with and directed that a new grand jury be impaneled. On May 5, 1965, the newly selected grand jury returned true bills of indictment Nos. 1087-1095 inclusive against the abovenamed individuals. No petitioner, individual or surety, had any notice whatsoever that such indictments had been returned.

Following the return of these true bills, and, again, without notice to any petitioners, the names of the newly indicted defendants were called out in open court. When they failed to answer, judgment *nisi* was entered against them and their sureties, and writs of *scire facias* issued

and made returnable to the August, 1965, Mixed Term of the Superior Court of Union County.

On August 30, 1965, petitioners by their attorneys moved to have the judgment *nisi* set aside as invalid and a deprivation of their constitutional rights under, *inter alia*, the Fourteenth Amendment to the United States Constitution. (See Appendix C) These motions were denied and, upon motion by the State, judgment absolute was entered on all the bonds posted by petitioners. All petitioners thereupon excepted and duly perfected their appeal to the Supreme Court of the State of North Carolina which, on December 15, 1965, modified and affirmed the denial of petitioners' motions, the granting of the State's motion and the entry of judgment absolute.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. This case presents substantial questions of Federal law not heretofore determined by this court.

A. The voiding of an indictment discharges a prisoner.

In its brief submitted to the Supreme Court of North Carolina in opposition to the contention of petitioners below, the State concedes that "the issue here involved is one of first instance in this jurisdiction." (p. 7) Simply stated, it is that the quashal of void indictments releases criminal defendants from the custody of the trial court.

In *Ex parte Baine, Jr.*, 121 U. S. 1, this Court had occasion to comment upon this problem. There the Court, in voiding a single-count indictment, parts of which had been amended by the lower court without being resubmitted to the indicting Grand Jury for its approval, held that the prisoner was thereupon discharged. Its language, which is of particular pertinency to the present proceeding, is compelling:

> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime, for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. *If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer', he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned.* The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex Parte Lange,* 18 Wall. 163; *Ex Parte Parks,* 93 U. S. 18; *Ex Parte Wilson,* 114 U. S. 418, 5 Sup. Ct. Rep. 935, and other cases." (emphasis supplied) [at 13-14.]

In its opinion voiding the 1961 indictments below, the Supreme Court of North Carolina stated that "it does not follow that defendants are entitled to discharge and dismissal of the charges." However, it must be borne in mind that, with the quashal of the indictments, there were no charges pending against petitioners. The record of the case below discloses that there was no process whatsoever issued against petitioners prior to the return of the invalid indictments by the Grand Jury on August 31, 1961. When those indictments were voided, there were no accusations in existence against any of the petitioners, leaving a jurisdictional hiatus in the State's criminal procedure.

It is hornbook constitutional law that in order to hold a person for the commission of crime, there must be in existence immediately after his arrest some legal process such as an information, an affidavit or a warrant of arrest. See *Draper* v. *United States,* 358 U. S. 307; and *Mallory* v.

United States, 354 U. S. 449. Subsequent to the issuance of such process, the accused must be promptly afforded a preliminary hearing in which he is permitted to test the sufficiency of the evidence against him. Only after such safeguards, may a person charged with crime be held for the action of a grand jury. Concededly, the action of the grand jury prior to the holding of a preliminary hearing may deprive an accused of the latter protection, but this does not, of course, obviate the requirement of the requisite legal process necessary to hold him in custody following his initial arrest.

Despite the absence of decisional law bearing directly on the issue at hand, there have been some partially analagous situations arising in a series of federal habeas corpus proceedings. For example in *Mitchell* v. *Youell,* 130 F. 2d 880, the court invalidated a state conviction because relator had been denied a fair trial. However, the court pointed out that its decision did not mean that the relator could not be tried again or held in custody pending such trial. As it stated:

> "While the conviction and sentence are void . . . he will be subject to arrest and trial under the indictment . . . in directing the release of the petitioner from the penitentiary, therefore, the court should direct that he be delivered to the officers of the State of Virginia to answer the charge contained in the indictment." (P. 882)

Similarly, in *Grandsinger* v. *Bovey,* 153 F. Supp. 202, aff'd 253 F. 2d 917, cert. den. 78 Sup. Ct. 1373, the court held that, although the conviction and sentence were void, the relator was discharged subject to the right of the State of Nevada to "take the respondent into, and retain him in, its lawful custody under the information now pending against him in the District Court of Nevada. . . ." Cf. *Irwin* v. *Dowd,* 366 U. S. 718; *Wiman* v. *Powell,* 293 F. 2d 605; *Wiman* v. *Argo,* 308 F. 2d 674.

In all of the foregoing federal cases, the issue involved was the reversal of criminal convictions rather than the voiding of indictments. But even this distinction is of small moment when, upon the voiding of an indictment, there is no pending charge subsisting against the party whose indictment is voided. In other words, it is constitutionally fatal to the retention of custody over such a person that there be no accusation in existence against him. Under such circumstances his continuing custody would be in contravention to the provisions of the Fifth Amendment, as incorporated in the Fourteenth Amendment.

B. The voiding of an indictment discharges a bond predicated solely thereon.

The pertinent decisions of North Carolina hold that there can be no forfeiture of bail where there is no formal charge pending against the accused. To put it another way, there can be no bail required of an accused who does not stand charged under some pending warrant or indictment. In this connection, see *State* v. *Schenck,* 138 N. C. 560; *State* v. *White,* 164 N. C. 410; *State* v. *Eure,* 172 N. C. 874, *In re Revocation of License of Wright,* 228 N. C. 584; *White* v. *Ordille,* 229 N. C. 490.

In *Wright* the court, in referring to the condition of bail, stated as follows:

> "In the ordinary case the condition is not broken by non-appearance generally, to be proved by any evidence, but only by non-appearance in answer to a call, to be proved by an entry made on the minutes of the court and returned as a part of the proceeding. 6 A. J. 116. The call can only be made and a judgment of forfeiture entered in a pending cause and by the judicial officer having jurisdiction thereof. Clark, Crim. Proc. 98, 99, 100; Bishop, Crim. Proc. 2d ed. 222; State v. Dorr, 5 L. R. A. 402 (W. Va.) See also S. C. Code of 1942, Sec. 940, 943 and 1041.

> "Here there was no warrant served on the defendant and it does not appear one was issued. As there was no warrant there was no criminal action pending in court. As there was no criminal action pending there could be no valid judgment of forfeiture. . . ."

As has been previously stated, the indictments in this case had been quashed by the Supreme Court of North Carolina. From the date of quashal until an unexceptional Grand Jury could return new bills, defendants were not charged with any offense. The bonds which are the subject of this litigation were written pursuant to the old and void bills of indictment. When the prior proceedings based on the original indictments fell, the bonds attendant upon such proceedings likewise fell. Thus, the Union County Superior Court was totally without jurisdiction or authority to call the petitioners under new indictments and declare the old bonds forfeit.

Concededly such cases as *State* v. *Speller,* 229 N. C. 67, talk about the continuous obligation of bail until final disposition. Petitioners contend that final disposition was had on the original charges both as a matter of law and as a matter of the bail contract. Bail bonds could have been written in such a manner as to bind the petitioners in the event of a quashal of indictment or reversal of the case or a new trial. They were, in fact, written to bind the petitioners to the "above cases". In this connection the Court's attention is respectfully called to the bond in *Wiman* v. *Argo, supra,* which specifically called for the appearance of the discharged prisoner notwithstanding his success in the federal courts.

In conclusion, it would be paradoxical, to say the least, if the voiding of an indictment discharged an accused, who was then in the custody of state officials, while at the same time appearance bonds, which stood in his place and stead, were held to continue in effect. As the court stated in *Shrode* v. *Rowoldt*:

> "When a party is required to post bail his sureties in effect, become his jailers and the power to require bail connotes the power to imprison in the absence of bail." (213 F. 2d 810, 814)

II. The North Carolina courts have adopted an arbitrary bond forfeiture procedure which deprives these petitioners of equal protection of the law and due process of the law.

The procedures by which the indictment was returned by the May, 1965, Union County Grand Jury and the forfeitures of the appearance bonds posted by petitioners were declared, violated the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. It is the contention of petitioners that Negroes were systematically excluded from the indicting Grand Jury. Not only were petitioners given no opportunity to adduce the necessary evidence to support this charge below, but the Union County Superior Court rendered an *ex parte* decision holding that the Grand Jury rolls had been adequately reformed after the voiding of the original indictments against petitioners.

Moreover, it is a clear violation of the Due Process Clause of the Fourteenth Amendment to require the appearance of a criminal defendant to answer an indictment without notice to him of its return or of any necessary appearances on his part in connection therewith and, on the basis of such failure to appear, to order the bond forfeited.

In the brief submitted by the State below, it contended that "the defendants and their sureties have at all times been fixed with notice that the trial had not terminated, the charge had not terminated and the prosecution of the case had not terminated. They knew the bond was a continuing bond in each case and that the defendants were

to appear until discharged by the court. They knew that the Supreme Court had not discharged the defendants, but, in fact, said they were to be held for new indictments." (p. 9)

But the State does not contend that petitioners had actual knowledge or could in fact have had actual knowledge of either the return of the new indictments or the dates on which they were to appear in Union County. In fact, according to the condition of the bonds themselves, petitioners were to appear before the Union County Superior Court at every term of court commencing with the May Term, 1964, a condition that was never met by petitioners nor insisted upon by the State.

Assuming, *arguendo,* that there was any real obligation on the part of petitioners to appear at each term of court commencing with the May Term 1964, the voiding of the indictments by the Supreme Court of North Carolina in January, 1965, certainly terminated this responsibility, but in any event it definitely destroyed any possibility of actual notice insofar as future appearances were concerned.

Conclusion

The issues raised in this petition are novel and far-reaching in their impact upon the fair administration of criminal justice. They should be reviewed by this Court. But more fundamentally, this petition should be granted and the judgment below reversed because the action of the State of North Carolina has deprived American citizens of their most elementary rights to due process of law and equal protection of the law. Since the posting of bail bonds is absolutely essential to the ability of civil rights demonstrators to protest for the redress of their grievances in a wholly hostile atmosphere, the circumstances of bond forfeitures in racial cases should be rigidly scru-

tinized by this Court. Elementary considerations of justice require the relief prayed for here.

The petition should be granted and the judgment of the court below reversed.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1965

Nos. 509 and 510—Union

STATE OF NORTH CAROLINA

against

MAE MALLORY, HAROLD REEP, RICHARD CROWDER, JOHN C. LOWRY, and RESOLUTE INSURANCE COMPANY and TIDEWATER BONDING AND SURETY AGENCY, INC., SURETIES FOR MAE MALLORY, HAROLD REEP and RICHARD CROWDER.

Appeal by defendants from McConnell, J., 30 August 1965 Session of Union.

Proceeding by the State of North Carolina to enforce forfeited appearance bonds and a forfeited cash deposit for appearance posted in lieu of bond.

At the February 1964 Mixed Session of Union County Superior Court the individual defendants were tried on two separate indictments, consolidated for trial. One indictment charged them jointly on 17 August 1961 with unlawfully, wilfully, feloniously and forcibly kidnapping one Mabel Stegall, a violation of G. S. 14-39. The other indictment is identical except that it charges the kidnapping of G. Bruce Stegall.

Plea: Not guilty. Verdict: Guilty as charged. Judgment of imprisonment was entered as to each defendant, and each defendant appealed to the Supreme Court.

Defendant Mallory gave an appearance bond when she appealed to the Supreme Court as follows:

Appendix A

IN THE SUPERIOR COURT

CASES NOS. 1088 & 1089

APPEARANCE BOND IN CASES ON APPEAL TO SUPREME COURT

"NORTH CAROLINA

UNION COUNTY

STATE OF NORTH CAROLINA

v.

MAY (MAE) MALORY

KNOW ALL MEN BY THESE PRESENTS:

"That May (Mae) Malory, as principal, and Resolute Insurance Co., as surety, are held and firmly bound unto the State of North Carolina in the sum of Fifteen Thousand ($15,000) Dollars, for which payment well and truly to be made, the parties hereto bind themselves, their heirs, executors, administrators, and assigns, jointly and severally firmly by these presents.

"Signed, sealed and dated this the 16 day of March, 1964.

"The condition of this bond is such that, whereas the above bounden, May (Mae) Malory having been convicted in the Superior Court of Union County, North Carolina, in the above numbered cases and having appealed from the judgments and sentences of the Court to the Supreme Court of North Carolina, and the Court having fixed her appearance bond in these cases Nos. 1088 Kidnapping G. Bruce Stegall; Nos. 1089 Kidnapping Mabel Stegall in the amount of Fifteen Thousand ($15,000) Dollars:

Appendix A

"Now, therefore, if the above bounden defendant, May (Mae) Malory shall make her appearance at the May 4th, 1964 term of Union County Superior Court and at each succeeding term of said Court pending the final disposition of the above cases, and shall not depart the same without leave of the Court, then this obligation shall be void; otherwise to remain in full force and effect.

s/ May Malory SEAL
May (Mae) Malory

RESOLUTE INSURANCE CO.

By Richard F. Taylor SEAL
Attorney in Fact

"Witness:

Carroll R. Lowder
Clerk of Superior Court

"State of North Carolina

Union County

"The execution of the foregoing instrument was acknowledged before me by Resolute Insurance Co. By Richard F. Taylor, Attorney in Fact, for the purposes therein expressed.

"Witness my hand and seal, this the 16 day of March, 1964.

CARROLL R. LOWDER
Clerk Superior Court Union County"

Defendant Reep, when he appealed to the Supreme Court, gave an appearance bond identical with that of defendant Mallory, and with the same surety, except that his bond is in the amount of $7,500.

Appendix A

Defendant Crowder, when he appealed to the Supreme Court, gave an appearance bond identical with that of defendant Mallory and with the same surety, except that his bond is in the amount of $10,000.

Defendant Lowry's wife posted with the Superior Court of Union County $5,000 in cash as security for his appearance, when he appealed to the Supreme Court. In the record Lowry's name is spelled Lowry and also Lowery. The appearance bond signed by Lowry and his wife is as follows:

"STATE OF NORTH CAROLINA

UNION COUNTY

STATE

V.

JOHN CYRL LOWRY

February 28 Term, 1964

Superior Court

RECOGNIZANCE

"In this case the deefndant John Cyril Lowry, and Mrs. Marcia Lowry his sureties, come into court and acknowledge themselves indebted to the State of North Carolina in the sum of Five ($5,000.00) Thousand Dollars.

"The conditions of the above obligation are such that if the above-bounden defendant John Cyrl Lowry shall make his personal appearance at the next term of this court, to be held on May 4, 1964 and at each succeeding term of said Court pending the final disposition of the above cases, 19.., and not

depart the same without leave, then this obligation to be null and void, otherwise to remain in full force and effect.

"Witness our hands and seals, this 28 day of February, 1964.

"Sworn and subscribed before me this 28 day of February, 1964.

/s/ JOHN C. LOWRY Seal
/s/ MRS. MARCIA LOWRY Seal

/s/ CARROLL R. LOWDER, C.S.C.

(on reverse side)

"NORTH CAROLINA, UNION COUNTY.

"Mrs. Marcia Lowry, one of the subscribers to the above undertaking, being duly sworn, says that he [sic] is a resident and freeholder in the State of North Carolina, and is worth the sum of $5,000.00 over and above all his [sic] debts and liabilities and exclusive of property exempt from execution.

"Sworn and subscribed before me, this
28th day of February, 1964.

/s/ MRS. MARCIA LOWRY.

/s/ CARROLL R. LOWDER, C.S.C."

The decision on the appeal in this case was filed by this Court on 29 January 1965, and is in 263 N. C. 536, 139 S. E. 2d 870. We quashed the two indictments for

racial discrimination in the selection of the grand jury that returned the indictments. The Court closed its opinion with this language:

> "The indictments are quashed and the verdict and judgments are vacated for want of valid indictments to support them. It does not follow that defendants are entitled to discharge and dismissal of the charges. If the State so elects it may send new bills and if they are returned true bills by an unexceptionable grand jury, defendants may be tried thereon for the offenses alleged."

The opinion of this Court was certified down to the Superior Court of Union County on 8 February 1965.

At the 15 February 1965 Session of Union County Superior Court, Burgwyn, E. J., entered an order commanding the county commissioners of Union County to prepare a new jury list without regard to race, creed or national origin, and place it in the jury box.

At the 3 May 1965 Session of Union County Superior Court, Shaw, J., had a hearing and found as a fact that the county commissioners had complied with Judge Burgwyn's order, and that the jury drawn for that session of court was properly drawn and constituted. Whereupon, from the jury drawn for that session a grand jury was duly chosen, sworn, impaneled and charged. On 4 May 1965 this grand jury found two separate indictments against all the individual defendants here and one Robert F. Williams. One indictment charged them jointly with feloniously and forcibly kidnapping Mabel Stegall, and the other indictment is identical except that it charges the kidnapping of G. Bruce Stegall. On the day these two indictments were returned by the grand jury, Mallory, Reep and Crowder were each called out in open court, and each failed to answer. Whereupon, the court entered a judgment *nisi* against each one of these three defendants

and the surety on the appearance bond of each one of these defendants, and further ordered that a *scire facias* be issued by the clerk. On the same day Lowry was called out in open court, and failed to answer. Whereupon, the court entered a judgment *nisi* on his cash bond.

Notice of judgment *nisi* was issued on 10 May 1965, and served on 28 May 1965 on Richard F. Taylor, Attorney in Fact for the Resolute Insurance Company, the surety on the appearance bond of Mallory; Mallory could not be found so notice of the judgment *nisi* was not served on her. This notice commands Mallory and the Resolute Insurance Company, the surety on her appearance bond, to be and appear before the presiding judge of the Superior Court for Union County at the courthouse in Monroe, North Carolina, on 30 August 1965, and then and there to show cause, if any they have, why the said judgment *nisi* shall not be made absolute against them, according to their aforesaid appearance bond. Similar notices of judgment *nisi* were issued on the same day and served on the same day on the same Attorney in Fact for the Resolute Insurance Company, surety on the appearance bonds of Reep and Crowder; Reep and Crowder could not be found, so notice of the judgment *nisi* was not served on them.

An answer to the notices of judgment *nisi* served upon the Resolute Insurance Company was filed by it and by its agent, Tidewater Bonding and Surety Agency, Inc., on 30 August 1965. In their answer they admit that they became sureties on the appearance bond of Mallory in the amount of $15,000, on the appearance bond of Reep in the amount of $7,500, and on the appearance bond of Crowder in the amount of $10,000. They allege in substance as follows: During the Spring Term 1965, the Supreme Court rendered its decision in which the convic-

tions of these three persons were reversed and the indictments quashed. From the time of the Supreme Court decision until 4 May 1965, Mallory, Reep, and Crowder were not charged with any criminal offense in the State of North Carolina. That neither the individual defendants nor they were put on notice that the cases would be called for trial at the May 1965 Session of court. That by reason of the aforesaid matters the appearance bonds of Mallory, Reep, and Crowder were absolutely discharged, and were no longer liable for their appearance in Union County Superior Court. Wherefore, they pray that the court issue a judgment discharging them from liability on these appearance bonds, and returning the appearance bonds to them.

The individual defendants here made a motion in writing before Judge McConnell in which they state that their appearance bonds, which the court at the May Session 1965 "had presumed to forfeit," had already expired by virtue of the opinion of the Supreme Court quashing the indictments against them. That the cases against these defendants were prematurely called for trial at the May Session 1965, in that their cases should only have been called for the purpose of determining whether or not the mandate of the State Supreme Court had been complied with and for the purpose of setting new appearance bonds and trial dates. The failure of the solicitor to notify these defendants of his election to proceed with new indictments, and the fact that the solicitor had never sought to admit defendants to new appearance bonds, constitute a denial of their rights under Article I, Section 17, of the North Carolina Constitution, and of the due process clause of the Fourteenth Amendment to the United States Constitution. Wherefore, these defendants, in order to safeguard their constitutional rights, through their attorneys moved the court for a dismissal of the bond for-

feitures entered against them, and for a striking of the judgments *nisi* which were entered against them at the May 1965 Session. The court denied this motion by the individual defendants. To the denial of this motion the individual defendants did not except.

Judge McConnell, after reciting in his judgment that none of the individual defendants were in court and that they and the sureties on their bonds have failed to show proper and sufficient cause why their appearance bonds should not be forfeited and judgment absolute entered thereon, and that Lowry had posted a cash bond in the amount of $5,000, entered a judgment forfeiting the appearance bond of Mallory in the amount of $15,000, the appearance bond of Reep in the amount of $7,500, the appearance bond of Crowder in the amount of $10,000, and the cash bond of Lowry in the sum of $5,000.

From this judgment the individual defendants and the corporate defendants appeal to the Supreme Court.

Attorney General T. W. Bruton and Deputy Attorney General Ralph Moody for the State, and Smith & Griffin by C. Frank Griffin for the Board of Education of Union County.

Mitchell & Murphy and W. B. Nivens for defendant appellants Mallory, Reep, Crowder and Lowry.

Seawell & Harrell by Bernard A. Harrell for defendant appellants Resolute Insurance Company and Tidewater Bonding & Surety Agency, Inc.

Parker, J. The individual defendants and the corporate defendants have brought up separate appeals from the same judgment. We have consolidated these appeals for the purpose of decision in one opinion.

The individual defendants here have two assignments of error: (1) to the entry of the judgment absolute on their

appearance bonds, and (2) to the denial by Judge McConnell of their motion for a dismissal of the bond forfeitures entered against them and for a striking of the judgments *nisi* which were entered against them at the May 1965 Session. The individual defendants did not except to Judge McConnell's denial of their motion. "This Court has universally held that an assignment of error not supported by an exception is ineffectual." Barnette v. Woody, 242 N. C. 424, 88 S. E. 2d 223.

The corporate defendants here have one assignment of error, and that is to the entry of the judgment absolute on the appearance bonds they signed as surety.

It is well-settled law in this jurisdiction that an exception to the judgment presents the face of the record proper for review, and the review is limited to the questions whether error of law appears on the face of the record proper and whether the judgment is regular in form. 1 Strong's N. C. Index, Appeal and Error, § 21, and Supplement thereto, Appeal and Error, § 21.

The contention of the individual defendants and of the corporate defendants is this: When the Supreme Court in its decision on the appeal of the individual defendants reported in 263 N. C. 536, 139 S. E. 2d 870, quashed the indictments against them, there was then no formal and valid charge against the individual defendants, and the individual defendants and the corporate defendants were by this decision released and discharged from any liability on their appearance bonds. With this contention we do not agree.

The Court said in S. v. Schenck, 138 N. C. 560, 49 S. E. 917: "It is said by the highest authority that a recognizance (or bail bond) in general binds to three things: (1) to appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the court; and (3) not to depart

without leave of the court; and that each of these particulars are distinct and independent. This was said, too, with reference to a bail bond worded precisely like the one in this case. It was contended by counsel in that case, which we will presently cite, that the stipulation not to depart the court without leave was an unusual one and of no binding force whatever, and in answering this contention the Court said: 'That a stipulation of this kind was valid and obligatory at common law is not to be doubted. It was so declared more than thirty years ago by this Court after full consideration.' S. v. Hancock, 54 N. J. Law, 393. That was a well considered case and seems to be a conclusive authority against the appellant upon the main question presented in the record."

S. v. Hancock, 54 N. J. Law 393, 24 A. 726, is in point here. The facts of that case are as follows: One Bush, being under an indictment for a statutory offence, entered into a recognizance with the defendant, Hancock, as his surety, the recognizance containing a condition "for the appearance" of Bush "to answer said indictment on November 18th, 1890, and not to depart the court without leave." Before the day designated for trial, the indictment was quashed, and a motion was made thereupon to discharge Bush's bail. That motion was refused. Subsequently, Bush, having been again indicted under the same statute in a different form, notice was given to his surety to produce him before the court on a given day, and, default being made at the time specified, the recognizance was duly forfeited of record. The position taken by Hancock is, that one of the express stipulations of the obligation entered into by him should be held by the court to be of no binding force whatever. He stipulated that Bush "should not depart the court without leave." That stipulation has been broken, and Hancock asserts that such breach is nugatory inasmuch as the stipulation has no

legal efficacy. The opinion, written by Chief Justice Beasley, states:

> "That a stipulation of this kind was valid and obligatory at common law is not to be doubted. It was so declared more than thirty years ago by this court, after full consideration, in the case of the State v. Stout, 6 Halst. 125. It was there judicially determined that a recognizance in general binds to three things—*first,* to appear to answer either to a specified charge, or to such matters as may be objected; *second,* to stand to and abide the judgment of the court, and, *third,* not to depart without leave of the court; and that each of these particulars was distinct and independent. The court further said that the party was not to depart until discharged, although no indictment should be found against him, or although he be tried and found not guilty by a jury.
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> "Thus far the subject seems to be free from difficulty, but there is another aspect of it which has laid the ground for the principal argument in behalf of the defence. It is argued that our statute relating to recognizances has annulled the condition usually contained in them, to the effect that the culprit shall not depart the court without leave. The statutory language thus relied on is this: 'That every recognizance entered into, before any court having criminal jurisdiction in this state, shall remain in full force and effect until the cause in which said recognizance shall be entered into, shall be finally determined or the same discharged by the order of the court.'

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"In the application of this statute to the case before the court, it was insisted by the counsel of the defendant that the present recognizance having been given in a proceeding under the indictment in question, when that indictment was quashed there was within the purview of the act a final determination of the cause to which the recognizance related. It was argued that the only cause pending before the court was the indictment, and that to annul it was to annul and, consequently, to determine such cause.

"It will be observed that in this course of reasoning it is assumed that the indictment is synonymous with 'the cause,' but this is not to be admitted. The indictment is not 'the cause,' the accusation of criminality is the cause, and the indictment is an incident in pursuing the accusation. It is true that the term 'cause' sometimes expresses a suit or action, but it has a broader signification, which comprises the prosecution of a purpose or object, and it seems to me that the word 'cause' in this act is used in the sense expressed by the word prosecution. Taken in this signification, the cause cannot be said to be finally determined when the indictment is quashed, for the indictment is but a formal part of the prosecution.

"All rational intendment is adverse to the narrower and special meaning of the word cause as employed in the statute, for it is hardly conceivable that it was the legislative purpose to absolve a criminal who was under bail from all obligation to render himself in court in the event of the existence of a flaw in the indictment. In that way criminals of the highest grade and of the most dangerous

character would often escape the pursuit of justice. In my opinion, the quashing of this indictment did not finally determine the cause—that is, the prosecution of this culprit.

"And, in addition to this view, it seems to me that the contention on the part of the state that the statute under consideration has not the effect of invalidating the legal operation of the recognizance in any particular, is well founded. The statutory language does not express, and there is no indication of, such a purpose. As we have seen, the common law bound the recognizor to appear up to the final determination of the prosecution, and, then, beyond that occurrence, to remain in the power of the court until he was discharged by the order of the court. The statute declares that the recognizance shall remain in full force until the final determination of the cause, and so far it is merely declaratory of the common law; but it does not say that the recognizance shall have no effect beyond the event so designated. The familiar rule is that statutes derogatory of the common law are to be construed strictly, and it is not perceived how, in the light of such a principle, it can be claimed that the effect which, on general legal rules, is to be given to this clause of the recognizance has been annulled by an act that has no reference to it in terms or by necessary implication, and when such abolition would, in a large degree, be hostile to public policy.

"Let the Circuit Court be advised that it is the opinion of this court that, as the case stands upon the certificate before us, the procedure on this recognizance is sustainable."

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The third headnote in the New Jersey Reports reads:

> "A culprit giving a recognizance to appear to an indictment, and not to depart from the court without leave, is not discharged from his obligation by the quashing of the indictment."

In United States v. White, Case No. 16,678, 28 Federal Cases, Circuit and District Courts, 1789-1880, the Court held, as stated in the second headnote:

> "A recognizance, to appear in court from day to day, to answer to a certain indictment, and not to depart without the leave of the court, is not discharged by the quashing of that indictment, but remains in force until the defendant has leave from the court to depart, and if a new indictment be found, he and his bail are bound for his appearance to answer such new indictment."

In State v. Warden, 119 Wash. 290, 205 P. 372, the first headnote in the Pacific Reporter reads:

> "Obligation of bond given under Rem. & Bal. Code, § 1957, by one bound over to the superior court for trial conditioned to appear and answer the charge is not discharged by demurrer being sustained to the information first filed, because of its failure to state some of the statutory elements of the offense, but requires answer to the 'charge,' which is the crime, and not a particular pleading on amended information being filed."

In its opinion the Court said:

> "The obligation of the bondsmen was to see that the defendant appeared in court and answered to the charge, which was that of rape, and they are

> not discharged on their obligation until the defendant has been released from that charge. The obligation was not to answer the complaint actually on file, but to answer to the charge of rape, whether presented by the complaint or subsequent information properly alleging the crime."

We have found meager authority on the precise question before us for decision. From the number of cases on the subject we have read, it seems to be generally held that whether the quashing of an indictment will discharge the bail must be determined by the conditions of the bond in question. 8 C. J. S., Bail, § 79(d); 8 Am. Jur. 2d, Bail and Recognizance, § 137; Annotation 20 A. L. R. 604.

In S. v. Eure, 172 N. C. 874, 89 S. E. 788, the Court said:

> "An appearance bond by its terms, and under the uniform ruling of the Court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal or by order of the court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the court."

In language crystal clear Mallory, as principal, and Resolute Insurance Company, as her surety, entered into an obligation firmly binding themselves to the State of North Carolina in the sum of $15,000, for which payment well and truly to be made, they bound themselves, their heirs, executors, administrators, and assigns, jointly and severally. This obligation has a condition expressed in language also crystal clear that whereas Mallory has appealed her conviction and sentence for kidnapping in cases Nos. 1088 and 1089 to the Supreme Court and the court has set her appearance bond at $15,000, "Now, therefore, if the above bounden defendant, May (Mae) Malory shall

make her appearance at the May 4th, 1964 term of Union County Superior Court and at each succeeding term of said Court pending the final disposition of the above cases, and shall not depart the same without leave of the court, then this obligation shall be void; otherwise to remain in full force and effect." Her appearance bond "is in the nature of a conditional judgment that may be discharged by performance of conditions or enforced on breach of conditions." 8 Am. Jur., 2d, Bail and Recognizance, § 2. Reep, as principal, and Resolute Insurance Company as his surety, and Crowder, as principal, and Resolute Insurance Company as his surety executed appearance bonds identical with the appearance bond of Mallory, except that Reep's bond is in the amount of $7,500 and Crowder's is in the amount of $10,000. In language crystal clear Lowry, as principal, and Mrs. Marcia Lowry as his surety entered into an obligation acknowledging themselves indebted to the State of North Carolina in the sum of $5,000. This obligation has a condition expressed in language also crystal clear that "the conditions of the above obligation are such that if the above-bounden defendant John Cyrl Lowry shall make his personal appearance at the next term of this court, to be held on May 4, 1964 and at each succeeding term of said Court pending the final disposition of the above cases, 19.., and not depart the same without leave, then this obligation to be null and void, otherwise to remain in full force and effect." Lowry or his wife posted a cash bond in the sum of $5,000.

This Court closed its opinion in the case quashing the indictments against the individual defendants with these words:

> "The indictments are quashed and the verdict and judgments are vacated for want of valid indictments to support them. *It does not follow that defendants are entitled to discharge and dismissal of the charges.*

If the State so elects it may send new bills and if they are returned true bills by an unexceptionable grand jury, defendants may be tried thereon for the offenses alleged.'' (Emphasis supplied.)

It is manifest from the clear and express language of all four appearance bonds here and from the clear and express language of this Court in its opinion quashing the indictments against the defendants that the quashing of these indictments did not discharge the appearance bonds, but they remained in full force. When the new indictments were found against the four individual defendants here at the 3 May 1965 Session of Union County Superior Court, each of these four individual defendants at that session were called out in open court, and each one failed to answer, which was a breach of the conditions of each one of the four appearance bonds by each one of the four individual defendants. Pursuant to G. S. 15-113, notices of judgment *nisi* were issued on 10 May 1965 in respect to the Mallory, Reep and Crowder bonds, and served on 28 May 1965 on Richard F. Taylor, Attorney in Fact for Resolute Insurance Company, but the individual defendants could not be found for service on them of the notices. The contention of Resolute Insurance Company that notices of judgment *nisi* were not served upon it as required by G. S. 15-113, but only served on the Attorney in Fact is without merit. The three appearance bonds executed by Resolute Insurance Company are signed Resolute Insurance Company, "By Richard F. Taylor, Attorney in Fact." Service on him was service on Resolute Insurance Company. Further, the corporate defendants filed an answer to the notices of judgment *nisi*, which alleges no sufficient reason why the appearance bonds signed by Resolute Insurance Company should not be enforced for breach of their conditions as above set forth.

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In respect to Lowry's cash bond, G. S. 15-113 reads in relevant part:

> "Provided, where the defendant deposits cash in lieu of bond or recognizance, upon his failure to appear for trial in accordance with the requirements of such cash bond then judgment nisi on the cash bond shall be entered and the defendant shall be charged with legal notice thereof without issuance or service of a scire facias or other notice and after thirty days or at the next term, whichever is later, judgment absolute forfeiting and condemning the cash bond shall be entered if the defendant then fails to appear or upon appearance fails to show legal excuse or other satisfactory explanation of his nonappearance at the term when judgment nisi was entered."

Judge McConnell properly and correctly entered judgment absolute on the three appearance bonds signed by Mallory, Reep, and Crowder respectively as principals and Resolute Insurance Company as surety on the bonds of each of them, and also in entering judgment absolute forfeiting and condemning Lowry's cash bond.

The contention of the individual defendants that "the failure of the solicitor to notify these defendants of his election to proceed with new indictments, and the fact that the solicitor had never sought to admit defendants to new appearance bonds, constitute a denial of their rights under Article I, Section 17, of the North Carolina Constitution, and of the due process clause of the Fourteenth Amendment to the United States Constitution," is totally without merit. The individual defendants had actual knowledge of the contents of the appearance bonds they signed as principals, and have actual knowledge of the opinion rendered in their case by this Court, or are charged with notice of it.

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At the 30 August 1965 Session of the Superior Court of Union County, all four individual defendants were called and failed to answer, and so far as the record and briefs before us disclose all four are still outside the State of North Carolina. In passing we might add that G. S. 15-122 provides: "The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself . . ."

Judge McConnell's judgment orders that the bonds of Mallory, Reep and Crowder, and the cash bond of Lowry, be, and they hereby are, forfeited absolutely. When this case is certified back to the Superrior Court of Union County, the presiding judge shall add to the judgment language in substance as follows: It is further ordered that the State of North Carolina shall have and recover from Mallory as principal and Resolute Insurance Company as surety the penalty of her appearance bond in the sum of $15,000, and similar language as to Reep's and Crowder's appearance bonds. See S. v. Bradsher, 189 N. C. 401, 404, 127 S. E. 349, 351; 18 Am. Jur., Pleading and Practice Forms, p. 189, "18:194. Order for Judgment on Scire Facias—Against Sureties on Forfeited Bond or Recognizance."

In the separate appeal of Resolute Insurance Company it appears from a stipulation by counsel of that company and the solicitor that Tidewater Bonding and Surety Agency, Inc., is an agent of Resolute Insurance Company.

The assignments of error by the individual defendants are overruled. The assignment of error by the corporate defendants is overruled.

The judgment below is Modified and Affirmed.

APPENDIX B

STATE OF NORTH CAROLINA v. LOWRY, ET AL.

MOORE, *Justice.*

Defendant Lowry filed a different statement of the case on appeal from that filed by the other defendants, and a separate brief. To avoid needless repetition we discuss the appeals in one opinion. There are many assignments of error; we find it necessary to discuss only three.

I.

The defendants assert and contend that G.S. § 14-39 will not support an indictment and conviction, for that its terms are vague, uncertain, ambiguous, and indefinite "so as to deprive appellants of due process of law as protected by the Fourteenth Amendment of the Federal Constitution" and Article I, section 17, of the Constitution of North Carolina.

In support of this contention appellants quote at length from 14 Am.Jur., Criminal Law, sec. 19, pp. 773-4, as follows: "The Legislature in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid.

* * * If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. * * * A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law." This is unquestionably

a statement of sound principles. State v. Hales, 256 N.C. 27, 122 S.E.2d 768, 90 A.L.R.2d 804; State v. Morrison, 210 N.C. 117, 185 S.E. 674; State v. Partlow, 91 N.C. 550; Drake v. Drake, 15 N.C. 10. But from the text cited by appellants we find the following (pp. 774-5): "A statute is not necessarily void for uncertainty because in creating a crime it does not define the offense, for if the offense is known to the common law, the common law definition may be adopted, even in jurisdictions where there are no common law crimes."

[1,2] "As a general rule, when an offense is declared by statute in the general terms of the common law, without more particular definition, resort may be had to the common law for the particular acts constituting the offense. In other words, regardless whether the common law has been abrogated, when a statute punishes an act giving it a name known to the common law, without otherwise defining it, the statute is construed according to the common-law definition." 22 C.J.S. Criminal Law § 21, p. 59 McAdams v. State, 226 Ind. 403, 81 N.E.2d 671 (Ind.1948); State v. Pratt, 151 Me. 236, 116 A.2d 924 (1955); State v. Quatro, 31 N.J.Super. 51, 105, A.2d 913 (1954); State v. Johnson, 293 S.W.2d 907 (Mo.1956). While all federal crimes are created by statute, common-law words used in the statute may take their meaning from the common law. United States v. Turley, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957).

[3,4] Kidnapping was a criminal offense at common law. In North Carolina "[a]ll such parts of the common law as were heretofore in force and use * * *, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or

in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force." G. S. § 4-1. The statutes of this jurisdiction relating to kidnapping, insofar as applicable to the instant case, did not originate the offense, they make kidnapping a felony and provide the limit of punishment. Kidnapping was a misdemeanor at common law. 1 Am.Jur., 2d, Abduction and Kidnapping, s. 3, p. 161, C.S. 4221 (P.L.1901, c. 699, § 1) provided that "If any person shall forcibly or fraudulently kidnap any person he shall be guilty of a felony, and upon conviction may be punished in the discretion of the court, not exceeding 20 years in the State's prison." This statute did not define "kidnap"; the common-law definition applied. The common-law definition is stated and explained in State v. Harrison (1907), 145 N.C. 408, 59 S.E. 867, as follows:

"Blackstone and some other English authorities define kidnapping to be the 'forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another.' In East, Pleas of the Crown, vol. 1, p. 429, it is described as 'the most aggravated species of false imprisonment.' and defined to be 'the stealing and carrying away or secreting of any person.' 'The Supreme Court of New Hampshire,' says Bishop, 'more reasonably, and apparently not in conflict with actual decisions, held that transportation to a foreign country is not a necessary part of this offense.' Bish. New Crim.Law, vol. 2, § 750. The case referred to is State v. Rollins, 8 N.H. 550, and sustains the author's text. Bishop states the better definition of kidnapping to be 'false imprisonment, aggravated by conveying the imprisoned person to some other place.' "

G.S. 4221 was repealed by G.S. § 14-39 (P.L.1933, c. 542), and the limit of punishment increased. The increase in the limit of punishment and enactment of other provisions (not pertinent here) were a direct result of the Lindbergh tragedy. G.S. § 14-39 does not define "kidnap,"

State v. Witherington, infra; it provides that "It shall be unlawful for any person * * * to kidnap or cause to be kidnapped any human being * * *. Any person * * * violating * * * any provisions of this section, * * * and upon conviction therefor, shall be *punishable* by imprisonment for life." This statute leaves the term of imprisonment in the discretion of the court, but increases the maximum term from 20 years to life. State v. Kelly, 206 N.C. 660, 175 S.E. 294.

[5] The word "kidnap," in its application to the evidence in the case at bar, and as used in G.S. § 14-39, means the unlawful taking and carrying away of a person by force and against his will (the common-law definition). State v. Gough, 257 N.C. 348, 126 S.E.2d 118, 95 A.L.R.2d 441; State v. Dorsett 245 N.C. 47, 95 S.E.2d 90; State v. Witherington, 226 N.C. 211, 37 S.E.2d 497; State v. Harrison, supra. It is the fact, not the distance of forcible removal of the victim that constitutes kidnapping. 1 Am.Jur., 2d, Abduction and Kidnapping, s. 18, p. 172; People v. Oganesoff, 81 Cal.App. 2d 709, 184 P.2d 953; People v. Wein, 50 Cal.2d 383, 326 P.2d 457, cert. den. 358 U.S. 866, 79 S.Ct. 98, 3 L.Ed.2d 99, reh, den. 358 U.S. 896, 79 S.Ct. 153 3 L.Ed.2d 122.

[6] The principles which appellant seek to apply are inapplicable. The word "kidnap" is known to the common-law, and the statute is construed according to the common-law definition.

II.

Defendants Lowry, Crowder and Reep moved for their discharge and the dismissal of proceedings against them, on the ground that their right to a speedy trial had been violated.

The offenses were allegedly committed on 27 August 1961. True bills of indictment were found and returned 31 August 1961, and defendants were brought to trial at the February Session 1964. The above named defendants had moved for trial at the May 1962 term of superior court.

"It is generally the policy of the law that criminal cases be promptly disposed of, * * * and the sixth amendment to the Federal Constitution guarantees to accused in a criminal prosecution under the federal law the right to a speedy trial. While this provision does not apply to criminal prosecutions in the state courts under state laws, the right is generally guaranteed by state constitutional or statutory provisions." 22A C.J.S. Criminal Law § 467(2), p. 20.

[7] Defendants urgently contend that the speedy-trial guarantee of the Sixth Amendment is applicable to state proceedings under the provisions of the Fourteenth Amendment. But the affirmative of this proposition is not essential to the maintenance of defendants' rights. The fundamental law of this state secures to them the right of speedy trial. In State v. Patton, 260 N.C. 359, 132 S.E.2d 891, this Court declared:

"The right of a person formally accused of crime to a speedy and impartial trial has been guaranteed to Englishmen since Magna Carta, and the principle is embodied in the Sixth Amendment to the Federal Constitution, and in some form is contained in our State Constitution and in that of most, if not all, of our sister states, or, if not, to statutory provisions. State v. Webb, 155 N.C. 426, 70 S.E. 1064 * * *.

"G.S. 15-10, entitled 'Speedy trial or discharge on commitment for felony,' requires simply that under certain circumstances 'the prisoner be discharged from cus-

tody and not that he go quit of further prosecution.' State v. Webb, supra.

"The Court said in Beavers v. Haubert, 198 U.S. 77, 87, 25 S.Ct. 573, 576, 49 L.Ed. 950, 954: 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'

"The constitutional right to a speedy trial is designed to prohibit arbitrary and oppressive delays which might be caused by the fault of the prosecution. Pollard v. United States, 353 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393; State v. Hadley, Mo., 249 S.W.2d 857. The right to a speedy trial on the merits is not designed as a sword for defendant's escape, but as a shield for his protection."

[8,9] No general principle fixes the exact time within which a trial must be had. Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court. 22A C.J.S. Criminal Law § 467 (4), pp. 24, 25, 30. "Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportions: the length of delay, the reason for the delay, the prejudice to defendant, and waiver by the defendant. See Note, 57 Colum.L.Rev. 846, 861-863 (1957). These factors are to be considered together because they are interrelated. For example, even a short delay might constitute a violation of the defendant's constitutional right where the defendant is held without bail, and there is no reason for the delay." United States v. Fay, 313 F2d 620 (CCA 2C 1963).

[10, 11] G.S. § 15-10 is for the protection of persons held without bail; it does not apply in the instant case. The movants were released on bail in September or October 1961 and have been at large at all times since. They are indicted jointly with defendant Mallory. Mrs. Mallory departed the State before she could be apprehended, and became a fugitive from justice. She went to Ohio and resisted extradition. The State of Ohio and the State of North Carolina were engaged continuously over a period of about two years in attempting to effect her return to North Carolina. She carried the question of her extradition to the Supreme Court of the United States twice, having litigated the matter through the Ohio State courts and the Federal courts (See: No. 858, Misc.; Supreme Court of the United States, October Term, 1962, Malory v. McGettrick, 372 U.S. 949, 83 S.Ct. 945, 9 L.Ed.2d 974 and No. 324, Misc., Supreme Court of the United States, October Term, 1963, Malory v. McGettrick, 375 U.S. 935, 84 S.Ct. 335, 11 L.Ed.2d 267). The case came to trial in Union County Superior Court promptly after her return to North Carolina. The absence of defendant Mallory and her pending extradition were the basis of denial of the motion of her codefendants for trial in 1962. The court anticipated from term to term her early return, and had no way of knowing it would require two years. The desire of the prosecution to try defendants together at one trial does not seem unreasonable since they were jointly charged. We note that at the time these defendants were urging trial in 1962 they were also moving for a change of venue which, if allowed, would have required a continuance. There is no evidence in the record tending to show that the abilities of defendants to present their defenses were in any way impaired by the delay. It would seem that the delay constituted a cooling period, which, more likely than not, was a benefit to them. The court committed

no abuse of discretion in denial of the motion for discharge and to dismiss. The assignment of error is overruled.

III.

[12] Defendants moved to quash the indictments on the ground that Negroes had been systematically excluded from service on the grand juries of Union County because of their race, and particularly from the grand jury in service at the time the indictments were found. The motion was made in apt time, before pleading to the indictments. State v. Covington, 258 N.C. 501, 128 S.E.2d 827. After hearing evidence and finding facts the court overuled the motion.

[13, 14] This Court has held in a long and unbroken line of cases beginning with State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902), that arbitrary exclusion of citizens from service on grand juries on account of race is a denial of due process to members of the excluded race charged with indictable offenses. The latest case is State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964). Ordinarily it is not deemed such denial if the defendant is not a member of the excluded race. In the instant case all of the defendants are Negroes except Lowry. Though he is white, he had lived and associated with Negroes in their homes and joined with them in their marches and demonstrations. Since he made common cause with them in their demonstrations and is cast jointly with them in the trial, we think he is entitled to raise the question also.

Defendants offered evidence in support of the motion and we summarize the evidence as follows: According to the 1960 census the population of Union County is 24,467 persons over 21 years of age. Of this number 4,423 or 18% are non-white. According to the 1961 tax ledger there were 12,577 white and 2,023 non-whites assessed

for taxes. Non-whites are 14% of the total. Some persons listed on the ledger are nonresidents. About 10% of those listed are women. The jury list for the county is made biennially, in odd years. A new jury list was made in June 1961. The names of all persons, regardless of race or sex, appearing on the tax ledger or scroll were put on the list. Names of females were added by taking every seventh or eighth female name, regardless of race, from voter-registration books (in 1963 all the female names in the registration books were put on the list—there had been a new registration). The list thus made was delivered to the county commissioners; they examined the list and excluded those exempt by statute; they placed an "x" beside each name to be excluded. The names approved by the county commissioners were put on separate slips of paper, one name on each slip, and these slips were placed in compartment no. 1 of the jury box. Each slip had the name, age and township of a prospective juror. If the person was colored, the designation "col." appeared after his or her name. When it was necessary to draw a venire for a term of court the names were drawn from the box by a child under 10 years of age, in the presence of the officials designated by statute, and the names were placed on a list. This constituted the jury panel for the ensuing term; the persons constituting the panel were summoned by the sheriff. At each February term or session a grand jury of 18 persons was drawn, to serve for one year. At the February terms the jury panel consisted of 48 jurors. Their names were put in a hat and 18 names were drawn from the hat by a child under 10. These constituted the grand jury. Usually 36 jurors were drawn for regular criminal and civil terms other than the February terms; 30 for the second week of criminal terms. There was testimony that the names drawn from the jury box for jury service were placed on the jury lists regardless of race, none dis-

carded. No copy of the original 1961 jury list, or of any lists prior thereto, was preserved. When a new list was made the slips in the box were destroyed. The grand jury which returned the indictments in the instant case was from the 1959 list. It was prepared in the same manner as was the 1961 list. From 1955 to 1958 there were no Negroes on the grand jury. From 1959 to 1962 there was one Negro on each grand jury. From November 1959 to February 1964, 706 jurors were drawn for service, and of this number 37 were Negroes. A special venire of 75 jurors was drawn in open court at the February 1964 session, for the trial of the instant case; 6 were Negroes.

Attorneys for defendants requested permission to count the names in the jury box and determine the number of whites and the number of Negroes, the sheriff to observe and assist. Upon objection by the solicitor, the request was not granted.

The judge found the following facts: The population of Union County is 83% white, 17% non-white. Three Negroes were drawn and reported for service on the panel of 48 jurors for the February Term 1961; the grand jury drawn from this panel had one Negro member—this is the grand jury that returned the bills in the case at bar. " * * * it is a general practice in Union County that the jury list carries the designation 'col.' behind the name of Negro jurors. * * * sometimes the designation 'col.' is omitted and there is no definite way to distinguish white from Negro from a study of the list." Negroes have served on the grand jury and petit jury in Union County before and subsequent to August 1961.

The court concluded that there was no evidence of systematic exclusion of qualified Negroes from jury service, defendants' constitutional rights were not abridged or violated, and the indictments are valid and proper.

We are of the opinion, and so hold, that the indictments are invalid and the court erred in denying the motion to quash.

The court found as a fact that "it is the general practice in Union County that the jury list carries the designation 'col.' behind the name of Negro jurors." It is obvious that "col." is an abbreviation of the word "colored" and is intended to designate race. This practice was in effect outlawed in State v. Speller, 229 N.C. 67, 47 S.E.2d 537. In that case the names of Negroes in the jury box were printed in red, while those of whites were printed in black. When the name of a Negro was drawn from the box it was discarded and the juror was not summoned. This Court ruled that these practices are discriminatory and arbitrary, and declared the following principle: "It has long been the holding in this jurisdiction that the law knows no distinction among those whose names are rightly in the jury box, and none should be recognized by the administrative officials. State v. Sloan, 97 N.C. 499, 2 S.E. 666; Capehart v. Stewart, 80 N.C. 101."

[15-17] Statutory provisions in this state, respecting the qualifications, selection, listing, drawing and attendance of jurors is fair and nondiscriminatory and meets all constitutional tests. State v. Wilson, supra. A jury list is not discriminatory merely because it is made from the tax lists. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469. But it is better practice to supplement such lists by resort to voter registrations and other available lists. We have no statutory requirement that the names placed in the jury box be designated according to race, and we perceive no good reason why such practice should be indulged. The reason assigned therefor in the case at bar is that many persons in Union County, white and Negro, have the same name and the racial designations

make it possible to positively identify a person so that notice may be mailed to the proper individual. Jurors are usually notified of their selection by mail, and accept service by mail; if service is not thus accepted they are summoned personally. We do not consider the reason assigned for racial designations a valid one. If two white jurors have the same name, race designation would not furnish identification. The obvious solution of the identification problem would be to add the addresses where confusion might arise. Of course, the designation of race, just as sex or religious denomination, may in certain records serve a useful and necessary purpose, and the compilation of such information cannot be outlawed *per se*. But the promotion of a distinction purely on the basis of race is not justified. Hamm v. Virginia State Board of Elections, 230 F. Supp. 156 (ED, Va. 1964), affd. 85 S.Ct. 157. It would be well for county commissioners and clerks of superior court to maintain for reference purposes statistical data with respect to the racial and sex composition of jury lists and juries which serve in the courts, so that the information may be readily available when motions such as the one under consideration are interposed. But this should not include racial designations in the jury box itself. Such practice lends itself to administrative abuses as in the Speller case, and casts doubt upon the administration of the jury system. As stated in Speller: "* * * the law knows no distinction among those whose names are rightly in the jury box."

[18, 19] There is in this record no direct evidence of administrative abuses or arbitrary exclusions so far as the conduct of the Union County officials is concerned. But there is a wide discrepancy in the ratio of the races in population and in jury service. Prior to 1963 there was never more than one Negro on any grand jury; during a period of 8 years, 1955 to 1962, inclusive, Negroes con-

stituted about 5% of the petit juries. There is, of course, no requirement of law that Negro representation on jury panels be equivalent percentage-wise to population. Neither the small percentage of Negroes on the juries of Union County, nor the racial designation placed after the names of Negroes on the jury box, is conclusive proof of arbitrary and systematic exclusion of Negroes from the grand jury. But such circumstances do constitute a *prima facie* showing to that effect.

[20, 21] With respect to the grand jury the facts of the instant case are closely analagous to those in State v. Wilson, supra. There, "one Negro served on the grand jury that returned the bill of indictment in question. Another served a year earlier." Two or three Negroes served during a seven-year period. In the case at bar four of the eight grand juries, during the period 1955 to 1962, had a Negro in service. In Wilson we said: "When, at a hearing upon a motion to quash the bill of indictment, there is a showing that a substantial percentage of the population of the county from which the grand jury that returned the bill was drawn is of the Negro race and that no Negroes, or only a token number, have served on the grand juries of the county over a long period of time, such showing makes out a *prima facie* case of systematic exclusion of Negroes from service on the grand jury because of race. Arnold v. North Carolina, 376 U.S. 773, 84 S.Ct. 1032, 12 L.Ed.2d 77; Eubanks v. Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2L.Ed2d 991; Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074. * * * To overcome such *prima facie* case, there must be a showing by competent evidence that the institution and management of the jury system of the county, is not in fact discriminatory. And if there is contradictory and conflicting evidence, the trial judge must make findings as to all material facts." Further: "The

burden of proving discriminatory jury practices is upon defendant. State v. Covington, 258 N.C. 495, 128 S.E. 2d 822; Miller v. State, 237 N.C. 29 74 S.E.2d 513; Akins v. Texas, supra (325.U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692). But this does not relieve the prosecuting attorney of the duty of going forwad with the evidence when the defendant has made out a *prima facie* case."

[22] In the instant case the crucial findings of fact are either indefinite or based on the absence of evidence. Defendants made out a *prima facie* case of systematic exclusion by showing the population ratio and that only a token number of Negroes had served on the grand jury, never more than one on any grand jury, sometimes none, and that such Negroes as were approved on the biennial list were designated "col." This was enough to cast the burden on the State to go forward with the evidence and show facts with respect to the management of the jury system sufficient to clearly overcome defendants' *prima facie* showing. But the State offered no evidence except such as it could elicit on cross-examination. The sheriff and the county commissioners were best qualified to give testimony relative to the administration of the jury system, since the law places upon them the primary responsibility therefor; they were not called and did not testify. Copies of jury lists, showing the names included and those excluded, were not kept; when a new jury list was made the old one was destroyed. The judge would not permit an examination of the current jury box or a determination of its racial composition. The court found that "there is no definite way to distinguish white from Negro from a study of the list," and Negroes have served on the grand jury and petit jury in Union County before and subsequent to August 1961," and "there is no evidence of systematic exclusion of qualified Negroes from jury service." These findings are negative in character, or

so general in nature as to be indefinite and inconclusive. They fall far short of a positive, factual showing sufficient to overcome defendant's *prima facie* evidence.

It is suggested that State v. Perry, 250 N.C. 119, 108 S.E.2d 447, cert. den. 361 U.S. 833, 80 S.Ct. 83, 4 L.Ed2d 74, establishes as a matter of law that there is no systematic exclusion of Negroes from grand juries in Union County. This proposition is, of course, untenable. Each case must be decided according to the evidence adduced and the circumstances involved. There might be a different result in separate cases involving the same grand jury. Furthermore, the Perry case involved the 1957 grand jury, of which we have very little evidence in the instant case. Furthermore, the Perry case did not involve, so far as the opinion discloses, any racial designation of the names in the jury box.

Defendants made other assignments of error, but, if there were errors, they may not again arise in the event of another trial.

The indictments are quashed and the verdict and judgments are vacated for want of valid indictments to support them. It does not follow that defendants are entitled to discharge and dismissal of the charges. If the State so elects it may send new bills and if they are returned true bills by an unexceptionable grand jury, defendants may be tried thereon for the offenses alleged.

Reversed.

APPENDIX C

IN THE SUPERIOR COURT

NORTH CAROLINA

UNION COUNTY

STATE OF NORTH CAROLINA

against

MAY MALLORY, RICHARD CROWDER, HAROLD REEP and JOHN CYRL LOWRY

Defendants as above named through and by their attorneys as hereunder indicated respectfully move the Court to strike the Judgments Ni Si which were entered during the May Session, 1965, and as reason for such Motion show unto the Court the following matter:

1. That the record in these causes does not show compliance with the Opinion and Mandate of the Supreme Court of North Carolina, which Opinion was filed in these causes on January 29, 1965, and which Opinion is reported at Page 536, Volume 263 of the North Carolina Reports; that in view of a lack of a showing of compliance with the above mentioned Opinion the cases against defendants were prematurely called for trial at the May Session, 1965.

2. That the Appearance Bonds which the Court at the May Term, 1965, had presumed to forfeit had already expired by virtue of the Quashal of the Indictments to which the said bonds adhered by the Supreme Court of North Carolina in the above mentioned Opinion.

3. That defendants cases were prematurely called for trial at the May Session, 1965, whereas, said cases should only have been called for the purpose of determining

whether or not the mandate of the State Supreme Court had been complied with and for the purpose of the setting of new Appearance Bonds and the setting of hearing or trial dates.

4. That the calling for trial of the cases against defendants, in view of the matter referred to in paragraphs one (1) through three (3) above and in view of the circumstance that defendants were never notified by the Solicitor of his election to proceed with new indictments and in view of the circumstance that the Solicitor had never sought to admit defendants to new bail bonds, was a denial of the Law of the Land as provided by Section 17, Article I of the Constitution of North Carolina and as provided by the Due Process Clause of the 14th Amendment of the Federal Constitution, as to both substance and procedural rights.

WHEREFORE, in order to safeguard the Constitutional Rights above mentioned, defendants through their attorneys and each of them respectfully move the Court for a dismissal of the bond forfeiture entered against them and for a striking of the Judgments Ni Si which were entered against them during the May 1965, Session

Respectfully submitted,

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Supreme Court of the United States

October Term, 1965

No. 1122

MAE MALLORY, HAROLD REEP, RICHARD CROWDER, JOHN C. LOWRY, and THE RESOLUTE INSURANCE COMPANY and TIDEWATER BONDING AND SURETY AGENCY, INC., Sureties for MAE MALLORY, HAROLD REEP and RICHARD CROWDER,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

October Term, 1965

No. 1122

MAE MALLORY, HAROLD REEP, RICHARD CROWDER, JOHN C. LOWRY, and THE RESOLUTE INSURANCE COMPANY and TIDEWATER BONDING AND SURETY AGENCY, INC., Sureties for MAE MALLORY, HAROLD REEP and RICHARD CROWDER,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

The Opinion of the Supreme Court of North Carolina in this case now before this Court is reported in 266 N. C. 31 (Advance Sheets, Filed 15 December, and issued 31 December). The original case out of which this case arises is reported below as STATE v. LOWRY and STATE v. MALLORY, 263 N. C. 536, 139 S. E. 2d 870.

JURISDICTION

The Petitioners attempt to invoke the jurisdiction of this Court under Title 28 USC 1257(3). The Respondent, State of North Carolina, contends that there is no basis for the exercise of the jurisdiction of this Court as will be discussed later on in this brief.

QUESTIONS PRESENTED

1. Whether Petitioners were deprived of any constitutional rights under the due process clause by the forfeiture of their appearance bonds under the circumstances of this case?

2. Whether Petitioners were deprived of procedural due process under the circumstances of this case?

3. Whether the Supreme Court of North Carolina deprives Petitioners of any constitutional rights in interpreting the effect of its own opinion and decision?

HISTORY OF THE CASE

This case has a long history and an extensive background.

The Petitioner, Mae Mallory, is a native of Georgia and originally came into North Carolina for the purpose of promoting demonstrations by the colored citizens of North Carolina. She is a Negro woman, and the Petitioners Richard Crowder and Harold Reep are Negro men who assisted Petitioner Mallory in all these various matters. The Petitioner John C. Lowery is a white man and came to Monroe, North Carolina, to assist in so-called Civil Rights demonstrations.

The Petitioners were originally indicted in the Superior Court of Union County, at the August Term, 1961, in two bills of indictment, in one of which they were charged with the felonious and forcible kidnaping of G. Bruce Stegall, and in the other bill of indictment they were charged with the felonious and forcible kidnaping of Mabel Stegall, the Wife of G. Bruce Stegall. Later on we will give some of the facts in regard to this kidnaping.

The Petitioner Mae Mallory became a fugitive from justice, having fled from the State of North Carolina, and sought asylum in the State of Ohio. The State of North Carolina instituted extradition proceedings which the Petitioner Mae Mallory vigorously contested, first in the state courts of

Ohio where her proceedings were rejected, and she applied to this Court to review the state proceedings, with the result that this Court denied her petition for certiorari (No. 858, Misc. May Malory, Petitioner, v. James J. McGettrick, Sheriff of Cuyahoga County, Ohio, 372 U. S. 949, 9 L. ed. 2d 974, 83 S. Ct. 945. See also the Ohio decisions: 173 Ohio St. 536, 20 Ohio Ops. 2d 151, 184 N. E. 2d 209).

After this Court refused to review the State of Ohio decisions on petition for certiorari the Petitioner, Mae Mallory, invoked the jurisdiction of the Federal courts and again her request for asylum in Ohio was rejected, and she again petitioned this Court for a writ of certiorari, which was denied (No. 324, Misc. May Malory, Petitioner, v. James J. McGettrick, Sheriff of Cuyahoga County, Ohio, 375 U. S. 935, 11 L. 2d 267, 84 S. Ct. 335. For the decision of the Circuit Court of Appeals, see: 318 F. 2d 816).

Thereafter, the Petitioner, Mae Mallory, sought a rehearing, which petition for rehearing was denied by this Court (No. 324, Misc. May Malory, Petitioner, v. James J. McGettrick, Sheriff of Cuyahoga County, Ohio, 375 U. S. 988, 11 L. ed. 2d 429, 84 S. Ct. 493; former decision, 375 U. S. 935, 11 L. ed. 2d 267, 84 S. Ct. 335).

Thereafter, the Petitioners were tried in the Superior Court of Union County on charges of kidnaping and were convicted and given prison sentences. The Petitioners appealed to the Supreme Court of North Carolina, and the Supreme Court of North Carolina awarded Petitioners a new trial (State v. Lowry and State v. Mallory, 263 N. C. 536, 139 S. E. 2d 870). The Petitioners were not satisfied with being given a new trial, and the quashing of the bills of indictment against them for improper organization of the grand jury, and they thereafter petitioned this Court for a writ of certiorari, which this Court denied on October 11, 1965 (No. 81, Misc. May Mallory, et al., Appellants, v. North Carolina, —— U. S. ——, 15 L. ed. 2d 16, 86 S. Ct. (1965) 227).

At the present time the Petitioners are fugitives from the

State of North Carolina. The Sheriff of Union County and other peace officers of the State have been unable to find Petitioners or to gain any knowledge or information as to their whereabouts.

STATEMENT OF FACTS

The records already on file in this Court, reference to which is cited above, will give the facts shown by the State in regard to this kidnaping. The records will further show that none of the Petitioners have testified as witnesses in their own behalf and where they would be subject to cross-examination, and Petitioners have never denied the evidence of the State. The simple facts as to the kidnaping are as follows:

On August 27, 1961, G. Bruce Stegall and his wife, Mabel Stegall, came into the Town of Monroe on the way to see Mrs. Stegall's mother. They drove out of town, went over a bridge, and turned into Winchester Avenue where they saw a crowd of people in the street. Mrs. Stegall told her husband to turn around and get out of that place, and he turned the car into Boyte Street in order to turn around. Before they could get away the car was surrounded by colored people and they were ordered out of their car, one of the Petitioners being on the driver's side of the Stegall car armed with a rifle. Another Petitioner was on another side of the car, armed with a rifle, and ordered Mrs. Stegall out of the car. The Stegalls were taken to the home of Robert Williams (Williams was not on trial because he sought asylum in the Communist Government of Castro's Cuba). A large crowd of people gathered around the Stegalls in the front yard of the Robert Williams residence. The Stegalls were taken inside the house and into a bedroom where they were guarded by May Mallory with a rifle at all times. The defendant Crowder produced cords and the Stegalls were tied together back to back. They were then moved to another house on the same street, having been taken out the back door and escorted by several people; and in this process Mrs. Stegall walked forward and Mr. Stegall walked backward because of the

way they were tied. The Petitioner Reep secured a chair and took it to the empty house and the Petitioner Crowder secured some chairs and carried them to the house with a rifle. The Petitioner Mallory guarded the Stegalls with a rifle and a flashlight and made some remarks to the effect that she had itchy fingers and that the quieter they were the longer they would live. The Petitioner Lowry was present and after the Stegalls were forced out of their car Lowry got into their car, stating that he would drive the car out of the street. The Stegalls were guarded not only by May Mallory but by other armed persons. About nine o'clock they were untied, given their car keys and drove away. Lowry had been staying at what is called "Freedom House", he spent some time at Dr. Perry's house and he had been eating his meals at the home of Robert Williams. Lowry contended that he had been given a rifle but that he did not use it and sat it down next to a tree. The "Freedom House" that is referred to is the house to which the Stegalls were taken from the Williams house. The object of this kidnaping, as will be seen from the telephone conversation between Chief of Police A. A. Mauney and Mr. Stegall, was to hold the Stegalls as hostages until certain colored persons who were prisoners were released.

ARGUMENT

The Petitioners' Statement of Facts

The statement of fact of the Petitioners as to all of the demonstrations, picketing and activities of the Ku Klux Klan constitute the usual stereotyped and canned language which a southern state has to meet in cases of this type before this Court. Even if these statements were true they relate to collateral matters which were never before or passed upon by the Supreme Court of North Carolina. There is absolutely no evidence whatsoever in the two State records before this Court (No. 509 and No. 510, Supreme Court of North Carolina, Fall Term, 1965,) which support these allegations. So far as the Ku Klux Klan is concerned there is some activity of this organization in this State but we are the people who convicted the Grand Wizard of the Klan and the Titan of the

Klan and sent them to the State Prison (STATE v. COLE, 249 N. C. 733, 107 S. E. 2d 732). In another instance we prosecuted certain Klan members and they entered pleas of guilty. At the time of the writing of this brief we have restrained the Klan by injunction from holding a meeting in this State. As we pointed out before, the Petitioner Mallory fled the jurisdiction of the State and had to be extradited, and the prosecuting officer not wishing to try the case piecemeal did not bring the case to trial until the Petitioner Mallory was brought back to the State. As will be seen from records already before this Court, one Robert Williams who participated in this kidnaping fled to Communist Cuba, where he is now a propaganda agent for Fidel Castro, and many of his radio and television broadcasts have been monitored in this country. Williams has also made a trip to Hanoi where he delivered a propaganda broadcast. No one will tell the State officers where the Petitioners are now and what the Petitioners really propose to do is to remain fugitives from the State of North Carolina, and if this Court reverses this case and discharges their sureties, then we will never see them again. We also call attention to the fact that G. Bruce Stegall and his wife, Mabel Stegall, were not participants in any of these things complained about, but, to the contrary, lived outside Monroe about two miles from a town called Marshville and had started to visit Mrs. Stegall's mother, and they apparently became lost on the outskirts of Monroe. If the State of North Carolina is not entitled to prosecute these Petitioners for forcibly seizing the Stegalls, tying them up and holding them prisoners under armed guard, then the State is not entitled to prosecute any crime.

Appearance Bond Procedure of North Carolina

We give below the pertinent statutes dealing with the forfeiture of bail in North Carolina, as follows:

Article 11

Forfeiture of Bail.

§ 15-110. *In recognizance to keep the peace.*—Every per-

son who shall have entered into a recognizance to keep the peace shall appear according to the obligation thereof; and if he fail to appear the court shall forfeit his recognizance and order it to be prosecuted, in the manner provided by law, unless reasonable excuse for his default be given.

§ 15-111. *When recognizance deemed broken.*—No recognizance taken under this chapter shall be deemed to be broken except in the failure of the principal in such recognizance to appear and answer according to the obligation thereof, unless such principal be convicted of some offense amounting in judgment of law to a breach of such recognizance.

§ 15-112. *Recognizance prosecuted.*—Whenever evidence of such conviction shall be produced in the court in which the recognizance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken.

§ 15-113. *Notice of judgment nisi before execution.*—No execution shall issue upon a forfeited recognizance, or to collect a fine imposed nisi, until a notice has issued against the person who has forfeited his recognizance or upon whom the fine has been imposed, and his sureties. The clerk shall issue a writ of scire facias directed to the process officer of the court and of the county.

§ 15-114. *What notice must contain.*—When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizors, the notice issued shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one, and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant.

§ 15-115. *Service of notice.*—All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And

in case he cannot be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return the same shall be deemed duly served.

§ 15-116. *Judges may remit forfeited recognizances.*—The judges of the superior courts may hear and determine the petition of all persons who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit, the same, and do all and anything therein as they shall deem just and right and consistent with the welfare of the State and the persons praying such relief, as well before as after final judgment entered and execution awarded.

§ 15-117. *Money refunded by clerk.*—The clerk of the superior court, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted.

§ 15-118. *Money refunded by treasurer.*—If the money has been paid to the county treasurer, he shall refund it to the person entitled, on his producing an attested copy of the record from the clerk of the court, certifying that such recognizance has been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto.

§ 15-119. *Forfeiture of bond before justice.*—On the failure of the accused to appear at the time and place mentioned in any bond taken by any justice of the peace for a continuance of any cause pending before him, and answer the charge, or, having appeared, on his departing the court without leave thereof first had and obtained, it shall be the duty of the justice of the peace then presiding to enter judgment nisi against the principal and his sureties in the bond for the amount mentioned therein, if the sum does not exceed the sum of two hundred dollars; and immediately issue notice to the principal and the sureties in the bond, giving ten days time, specifying time and place, to appear and show cause, if any they have, why the judgment nisi shall not be made final.

§ 15-120. *Judgment final, rendered and enforced.*—If the defendant shall fail to appear and show satisfactory reasons for not complying with the provisions of the bond, it shall then be the duty of the justice of the peace to render a final judgment thereon for the amount of the same, and immediately make and transmit to the clerk of the superior court a transcript thereof, which shall be entered upon the judgment docket of the court, and the clerk shall issue execution on the final judgment against the principal and his sureties for the collection of the amount thereof as in other judgments in behalf of the State.

§ 15-121. *Forfeiture of bond over two hundred dollars before justice.*—If the bond shall exceed the sum of two hundred dollars, and the accused shall fail to appear as therein provided to answer the charge, or, having appeared, shall depart the court without leave first had and obtained, it shall be the duty of the justice to have the accused called, and enter upon the bond that the defendant was called and failed to answer, and immediately return the original papers in the case together with the bond, to the clerk of the court having jurisdiction to try such action, who shall immediately enter the case upon the criminal docket of his court and enter judgment nisi for the amount of the bond, and issue notice to the accused and his sureties to appear at the next term to show cause why the judgment should not be made final and proceeded in as other cases of forfeited bonds in behalf of the State in such court. The entry on the bond by the justice of the peace shall be prima facie evidence that the principal therein had been called and failed to answer. Nothing in this section shall be so construed as to prevent justices of the peace from remitting the penalty of the bond or the right of appeal from the justice of the peace to the superior court by the defendant or his surety.

§ 15-122. *Right of bail to surrender principal.*—The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal,

in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody as if bail had never been given: Provided, that in criminal proceedings the surrender by the bail, after the recognizance has been forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for.

§ 15-122. *Right of bail to surrender principal.*

Provided, further, that if the defendant is in legal custody or imprisoned in the State of North Carolina or in any other state or territory of the United States at the time such defendant is bonded to appear in court, then the hearing on the writ of scire facias shall be continued for not less than ninety (90) days in order to give the surety an opportunity to produce the defendant.

Petitioners were not deprived of any constitutional rights by the forfeiture of their appearance bonds.

The Petitioners, having been convicted of kidnaping in the Superior Court of Union County, appealed to the Supreme Court of North Carolina where the indictments against them were quashed for the reason that the Supreme Court of North Carolina decided that the grand jury that returned the two bills of indictment was improperly organized because of racial discrimination in its selection (STATE v. LOWRY and STATE v. MALLORY, 263 N. C. 536, 139 S. E. 2d 870; see Opinion of Supreme Court of North Carolina in Appendix "B" of Petitioners' brief).

The Petitioners were warned in this Opinion that while the indictments were quashed the charge against them was not invalidated. The Supreme Court of North Carolina said:

> "The indictments are quashed, and the verdict and judgments are vacated for want of valid indictments to support them. It does not follow that the defendants are entitled to discharge and dismissal of the charges. If the State so elects it may send new bills and if they are returned true bills by an unexceptionable grand jury, defendants may be tried therein for the offenses alleged."

This Court will notice in the above language that the Supreme Court of North Carolina specifically stated that: "It does not follow that the defendants are entitled to discharge and *dismissal of the charges.*" (Emphasis ours) The Petitioners were, therefore, specifically warned that the *charges* still existed against them, and, therefore, under the terms of their appearance bond they were required to appear at the Superior Court of Union County and at each succeeding term of said Court "pending the final disposition of the above cases, and shall not depart the same without leave of the Court" (see provisions of appearance bond on p. 5 of Petitioners' brief).

In February, 1965, at a term of the Superior Court of Union County, Judge W. H. S. Burgwyn ordered the County Commissioners to constitute a new grand jury list without regard to race, creed or national origin, and this grand jury returned true bills again on the kidnaping charges (see State record in No. 509, pp. 7, 8; State record in No. 510, pp. 7, 8, 9). We repeat, Petitioners and their counsel were specifically warned in this Opinion that the charges had not been dismissed, and they should have known that Petitioners should be present in Court.

The Petitioners do not specifically attack any particular statute of North Carolina in regard to bail but say they did not have notice that the indictments had been returned. There are two answers to this position: Petitioners had notice by the terms of their appearance bond that they were required to appear from time to time until they were discharged by order of the Court. This is what is called in North Carolina a "continuing appearance bond." In STATE v.

EURE, 172 N. C. 874, 89 S. E. 788, the Supreme Court of North Carolina construed the conditions of an appearance bond and said:

> "An appearance bond by its terms, and under the uniform ruling of the Court, requires that the defendant appear term after term until he is discharged on a verdict of acquittal by order of the Court. An appearance bond is in lieu of custody in jail, in which case the defendant could not be released until discharged by order of the Court."

As early as 1905, the Supreme Court of North Carolina held (STATE v. SCHENCK, 138 N. C. 560, 49 S. E. 917) that a bail bond in this State binds to three things: (1) to appear and answer either to a specified charge or to such matters as may be objected; (2) to stand and abide the judgment of the Court; and (3) not to depart without leave of the Court. As to the third condition as to not departing without leave of the Court, the Supreme Court of North Carolina cited with approval STATE v. HANCOCK, 54 N. J. Law 393, 24 A. 726. The New Jersey Court in a situation similar to this one cited STATE v. STOUT, 6 Halst. 125, wherein the Court approved these three provisions and said: "That the party was not to depart until discharged, although no indictment should be found against him." The New Jersey Court further gave an unanswerable reason for its position for in discussing the situation Chief Justice Beasley said:

> "All rational intendment is adverse to the narrower and special meaning of the word "cause" as employed in the statute, for it is hardly conceivable that it was the legislative purpose to absolve a criminal who was under bail from all obligation to render himself in court in the event of the existence of a flaw in the indictment. In that way criminals of the highest grade and of the most dangerous character would often escape the pursuit of justice. In my opinion, the quashing of this indictment did not finally determine the cause—that is, the prosecution of the culprit.

In UNITED STATES v. WHITE, Case No. 16,678, 28 Federal Cases, Circuit and District Courts, 1789—1880, the Court held, as stated in the headnote:

> "A reconnaissance, to appear in court from day to day, to answer a certain indictment, and not to depart without the leave of the court, is not discharged by the quashing of that indictment, and if a new indictment be found, he and his bail are bound for his appearance to answer such new indictment."

In STATE v. WARDEN, 119 Wash. 290, 205 P. 372, the Court said:

> "The obligation of the bondsmen was to see that the defendant appeared in court and answered to the charge, which was that of rape, and they are not discharged on their obligation until the defendant has been released from that charge. The obligation was not to answer the complaint actually on file, but to answer to the charge of rape, whether presented by the complaint or subsequent information properly alleging the crime."

In STATE v. SPELLER, 229 N. C. 67, 47 S. E. 2d 537, where a bill of indictment was quashed because of grand jury discrimination, the Supreme Court of North Carolina said:

> "The defendant is not to be discharged. He will be held until the accusation against him can be performed by an unexceptionable grand jury, and, even after the present bill is quashed, the court may still order his detention for a like purpose, if need be, in manner similar to that approved in STATE v. GRIFFICE, 74 N. C. 316."

Likewise, in STATE v. COVINGTON, 258 N. C. 495, where a new trial was ordered the Supreme Court of North Carolina said:

> "The defendant is not to be discharged. He will be held

until indictments against him can be found by an unexceptionable grand jury."

Again in STATE v. PERRY, 248 N. C. 334, the Supreme Court of North Carolina held that the defendant had not been given reasonable time to produce evidence of racial discrimination in the selection of the grand jury, and the defendant was awarded a new hearing. The Court said if upon the new hearing discrimination was found and the indictment quashed, then "the defendant is not to be discharged. He will be held until indictment against him can be found by an unexceptionable grand jury."

The substance of the above holdings is that a defect in the bill of indictment is an informality that does not relieve the defendant of the "charge" or "cause" against him. In the first trial of any defendant there may be various defects in the trial or in rulings on matters of criminal procedure but the cause or charge of kidnaping, as in this case, still exists against the defendants and under their bail bond they are still required to appear until they are discharged by order of the Court. It is believed that this Court has held in substance that the principles here contended for are valid (HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159; PATTON v. MISS., 332 U. S. 463, 92 L. ed. 76, 68 S. Ct. 184).

The Question of Notice to Petitioners

The petitioners complain that on the second bills of indictment there was no preliminary hearing and it is contended that "the accused must be promptly afforded a preliminary hearing in which he is permitted to test the sufficiency of the evidence against him." The Petitioners do not cite any authority for this proposition, and it is not believed that they could find any holdings of appellate courts to such effect. This is not the rule in North Carolina, as will appear in the case of STATE v. SAMUEL HARGETT, 255 N. C. 412, 121 S. E. 2d 589.

The North Carolina statute as to forfeiture of bail was rig-

idly followed as will appear in State records on file in this case. The North Carolina statute (G. S. 15-110) requires the principal of a bond to "appear according to the obligation thereof." It is also provided by the North Carolina statute (G. S. 15-113) that no execution shall issue upon a forfeited appearance bond until a notice has issued against the person who has forfeited his reconnaissance, and G. S. 15-114 states what the notice must contain. As to the service of the notice (G. S. 15-115) it is provided as follows:

> "All notices issuing upon forfeited reconnaissances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he cannot be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return the same shall be deemed duly served."

An examination of the records will show that this procedure was followed, and certainly the corporate sureties cannot complain for notice was served upon the attorney in fact for these companies, and as will be seen in each record in this case the sureties, Resolute Insurance Company and Tidewater Bonding and Surety Company, Inc., filed answers to the writs of *scire facias* served upon their attorney in fact. Certainly these corporate sureties through their agents either knew where the Petitioners were hiding or there had been deposited with them so much collateral that they did not care to know. We have never known where Petitioners went nor to this day does the State of North Carolina and its officers know where the Petitioners have secreted themselves. It was impossible to serve these writs of *scire facias* upon the individual Petitioners, and if the procedure laid down in the North Carolina statutes on the forfeiture of bail is not valid, then every criminal in the State may put himself or herself beyond the reach of the law.

It should also be pointed out that after the first writ of *scire facias* is issued it is made returnable at the next term of court "commencing 30 days after the service of same, and the defendant and his sureties may file answer as in civil

actions prior to the return date." Certainly the sureties in this case had ample notice and although the Petitioners through their attorneys disclaim any notice to them, it is not contended that attorneys for Petitioners did not know that these forfeiture proceedings were pending. Under North Carolina law (G. S. 15-122) the bail had the full right to arrest the body of his principal and surrender him to the sheriff, and these Petitioners have never at any time availed themselves of the remedy provided by G. S. 15-116, which provides that the Judges of the Superior Courts may hear and determine the petition of all persons who shall conceive that they merit relief on their reconnaissances forfeited. These same Judges may lessen, or absolutely remit the forfeiture and this before as well as after final judgment entered and execution awarded (STATE v. BRADSHER, 189 N. C. 401, 127 S. E. 349; STATE v. DEW, 240 N. C. 595, 83 S. E. 2d 482).

In view of the fact that in North Carolina the sureties on a bail bond have legal custody of the Petitioners, which is a substitute for being in custody in jail, and the sureties can at all times surrender the Petitioners in exoneration of their liability at any time, either before or subsequent to bond forfeiture, it is the position of the State of North Carolina that actually notice to the sureties constitutes actual notice to the principals or the Petitioners. In STATE v. LINGERFELT, 109 N. C. 775, 14 S. E. 75, the Supreme Court of North Carolina quoted from the case of 16 Wall. 371, the language of this Court as follows:

> "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once they may imprison him until it can be done. They may exercise their right in person or by agent; they may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. * * * In 6 Modern, 231, it is

said: 'The bail have their principal on a string and they may pull the string whenever they please, and surrender him in their discharge.' The right of the bail in civil and criminal cases are the same."

Undoubtedly the corporate sureties in this case have taken ample collateral to secure any liabilities that they may incur. If they can invalidate these proceedings and have themselves released from liability, then the Petitioners will never again be seen in the State of North Carolina, and it will be open to them to seek asylum in Communist Cuba with Robert Williams who participated with them in this kidnaping and who is now Castro's propaganda agent. The invalidation of these State proceedings by this Court will result in a situation where there can be no forfeiture of bail if the principal will remain concealed until actual notice is served upon him even though the sureties are served with actual notice. It will be a plain invitation to all persons charged with crime to become fugitives from justice.

CONCLUSION

The State of North Carolina earnestly requests this Court to reject this petition for certiorari. Even though final judgment has been entered against both Petitioners and their sureties, if the Petitioners will appear for trial the sureties still have the right to file a petition and ask for total or partial relief from the penalties of the appearance bonds (see G. S. 15-116, supra).

This bail bond procedure, or its equivalent, has been used by the State of North Carolina for generations. It has been construed by the Supreme Court of North Carolina and we contend that this is a plain case where the Supreme Court of a state has done nothing more than interpret and pass upon its own laws and procedures. The petitioners have no vested or constitutional right in appellate court interpretations, and cases may be overruled, distinguished or new interpretations made to fit new situations without depriving the Petitioners of any constitutional right. This Court has re-

peatedly affirmed the general proposition that the Fourteenth Amendment basically provides for fundamental fairness but the states have the right to choose the various procedures by which criminal affairs shall be conducted, and it was not intended by the Fourteenth Amendment to force all of the states into the same pattern of conformity in their criminal administrative procedures. North Carolina asks this Court to deny this petition.

Respectfully submitted,

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